

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

11 LAURA LYNN,) No. CV 09-08717-PSG (VBK)
12 Plaintiff,)
13 v.) REPORT AND RECOMMENDATION OF
14 ALAN FRIEDENTHAL, et al.,) UNITED STATES MAGISTRATE JUDGE
15 Defendants.)

)

17 This Report and Recommendation is submitted to the Honorable
18 Philip S. Gutierrez, United States District Judge, pursuant to 28
19 U.S.C. §636 and General Order 05-07 of the United States District
20 Court for the Central District of California.

PROCEEDINGS

23 On November 25, 2009, Laura Lynn (hereinafter "Plaintiff") filed
24 a Complaint entitled "Complaint for Immediate Injunctive and Other
25 Relief." Plaintiff brought this action for injunctive relief,
26 compensatory and punitive damages pursuant to 42 U.S.C. §1983 and 18
27 U.S.C. §§241 and 242. (Complaint at 3.) Plaintiff named as Defendants
28 Alan H. Friedenthal, individually and in his official capacity as

1 Commissioner of the Superior Court of the State of California, Los
2 Angeles; Steff R. Padilla, individually and in her official capacity
3 as Commissioner of the Superior Court of the State of California, Los
4 Angeles; the Superior Court of the State of California, Los Angeles;
5 Michael Howard; Helen A. Lynn; Kenneth P. Sherman; Carlson, De Klerk,
6 Sherman and Rale, and Does 1-9. (Complaint at 1-5.)

7 On April 20, 2010, the Court issued an Order re Dismissal with
8 Leave to Amend.

9 On May 19, 2010, Plaintiff filed a "First Amended Complaint"
10 pursuant to 42 U.S.C. §§1983, 1985 and 1988.

11 On July 19, 2010, Defendants Commissioner Friedenthal,
12 Commissioner Padilla and the Superior Court of the County of Los
13 Angeles filed a "Notice of Motion and Motion to Dismiss Plaintiff's
14 First Amended Complaint by Defendants Commissioner Friedenthal,
15 Commissioner Padilla and the Superior Court of California, County of
16 Los Angeles; Memorandum of Points and Authorities in Support Thereof
17 [F.R. Civ. P. Rules 12(b)(1) and (6)]."

18 On August 17, 2010, Plaintiff filed "Plaintiff's Request for
19 Judicial Notice" and "Plaintiff's Opposition to Motion to Dismiss."

20 On August 31, 2010, Defendants Commissioners Friedenthal and
21 Padilla and the Superior Court filed a "Reply to Plaintiff's
22 Opposition to the Defendants' Motion to Dismiss First Amended
23 Complaint."

24 On October 12, 2010, Defendants Kenneth P. Sherman and Carlson,
25 De Klerk, Sherman & Rale filed an Answer to Plaintiff's First Amended
26 Complaint.

27 On February 9, 2011, United States Magistrate Judge Victor B.
28 Kenton issued a Report and Recommendation recommending that Defendants

1 Commissioner Friedenthal, Commissioner Padilla and the Los Angeles
2 County Superior Court's Motion to Dismiss be granted.

3 On March 8, 2011, United States District Judge Philip S.
4 Gutierrez issued an "Order Accepting and Adopting the Report and
5 Recommendation of United States Magistrate Judge" and "Judgment" was
6 entered dismissing Defendants Commissioner Friedenthal, Commissioner
7 Padilla, the Los Angeles County Superior Court and Michael Howard with
8 prejudice.

9 On May 25, 2011, Defendants Kenneth P. Sherman, Carlson, De
10 Clerk, Sherman & Rale filed a "Notice of Motion and Motion for
11 Judgment on the Pleadings as to Plaintiff's First Amended Complaint by
12 Defendants Kenneth P. Sherman, and Carlson, De Clerk, Sherman & Rale;
13 Memorandum of Points and Authorities in Support Thereof" and "Request
14 for Judicial Notice in Support of Motion for Judgment on the Pleadings
15 as to Plaintiff's First Amended Complaint" (hereinafter referred to as
16 "RJN").

17 On May 31, 2011, the Court issued a Minute Order ordering
18 Plaintiff to file an Opposition or Statement of Non-Opposition to
19 Defendants' Motion for Judgment on the Pleadings.

20 On June 24, 2011, Plaintiff filed "Response to Notice of Motion
21 and Motion for Judgment on the Pleadings as to Plaintiff's First
22 Amended Complaint by Defendants Kenneth P. Sherman and Carlson, De
23 Clerk, Sherman and Rale" (hereinafter referred to as "Opposition").

24 On July 7, 2011, Defendants filed a "Reply in Support of Motion
25 for Judgment on the Pleadings as to Plaintiff's First Amended
26 Complaint by Defendants Kenneth P. Sherman, and Carlson, De Clerk,
27 Sherman and Rale; Memorandum of Points and Authorities in Support
28 Thereof" (hereinafter referred to as "Reply").

Having reviewed the allegations in Plaintiff's First Amended Complaint, Defendants Kenneth P. Sherman and Carlson, De Clerk, Sherman & Rale's Motion for Judgment on the Pleadings, Plaintiff's Opposition and Defendants' Reply, the Court hereby recommends that Defendants' Motion for Judgment on the Pleadings be granted.

6

7 **STATEMENT OF FACTS**

8 Plaintiff was a party to a contentious custody dispute in Los
9 Angeles County Superior Court Case No. PD 016769. (FAC at ¶ 17.) In
10 July of 2007, Defendant Kenneth P. Sherman, a partner in the law firm
11 of Carlson, De Clerk, Sherman and Rale, was appointed by Defendant
12 Commissioner Friedenthal to represent Plaintiff's two minor sons, S.L.
13 and B.L., in the custody proceedings. (FAC, ¶¶ 11, 12, 38.) Defendant
14 Commissioner Friedenthal placed the children, B.L. and S.L., in the
15 custody of their paternal grandparents, Helen and Jim Lynn. (FAC, ¶
16 39.) Plaintiff alleges that her warnings regarding the grandparents'
17 unfitness to care for the children were foreshadowed by the fact that
18 her son, S.L., later chose to live on the streets instead of with his
19 father. (FAC, ¶¶ 39, 41.) Plaintiff alleges that Defendants
20 Commissioner Friedenthal and Kenneth P. Sherman predicted that this
21 would happen to S.L. (FAC, ¶ 41.)

22 Plaintiff alleges that in December of 2007 Defendant Kenneth P.
23 Sherman failed to return any of her phone calls while she was
24 attempting to regain custody of her son, B.L., with whom she had only
25 limited visitation rights. (FAC, ¶¶ 40, 49.) On December 21, 2007,
26 Defendant Kenneth P. Sherman applied, ex parte, for an Order to Show
27 Cause why Plaintiff's visitations with her children should not be
28 professionally monitored. (FAC, ¶ 49; RJD, Exhibit ["Ex."] 1.) The ex

1 parte application was supported by the declaration of Helen Lynn, who,
2 along with Jim Lynn, had custody of B.L. at that time. Helen Lynn
3 declared that, among other recent problems, B.L. had become
4 "belligerent and verbally assaultive" after spending the weekend with
5 Plaintiff, and had "talked about killing [Helen] and killing himself."
6 (RJN, Ex. 1, p. 7, ¶ 9.)

7 Plaintiff alleges that the ex parte application was motivated by
8 her admitted actions on December 19, 2007, wherein she hung missing
9 children posters around her in-laws' neighborhood regarding M.S. and
10 L.S., Jim and Helen Lynn's other grandchildren. (FAC, ¶¶ 18, 48, 52.)
11 Defendant Commissioner Friedenthal was upset with Plaintiff for
12 hanging missing children posters of M.S. and L.S. (Plaintiff's ex-
13 husband's sister's children). Defendant Commissioner Friedenthal said
14 if they were not her children she had no business hanging missing
15 children posters. (FAC at ¶¶ 49-50.)

16 Defendant Commissioner Friedenthal granted the ex parte
17 application and ordered that Plaintiff's visitations be professionally
18 monitored at her expense. (FAC ¶¶ 50, 51; RJN, Ex. 2, p. 43.)
19 Plaintiff alleges that the hanging of the missing children posters of
20 M.S. and L.S., is free speech and that the conspiracy between Helen
21 Lynn and Defendant Kenneth P. Sherman to violate Plaintiff's protected
22 speech is in violation of 42 U.S.C. §§ 1983 and 1985. (FAC, ¶¶ 50,
23 53.)

24 Defendant Kenneth P. Sherman continued to represent Plaintiff's
25 son B.L. until the attorney Defendants made a motion to be relieved as
26 counsel which was granted by the Court on July 16, 2008. Thereafter,
27 attorney E. Scott Clarke was appointed to represent B.L. (FAC ¶ 62.)

1 **PLAINTIFF'S CAUSES OF ACTION**

2 Plaintiff alleges the following causes of action:

- 3 1. Violation of the rights of Plaintiff under the First and
4 Fourteenth Amendments of the United States Constitution and
5 42 U.S.C. §§1983, 1985 and 1988, wherein Plaintiff claims
6 that Defendants Commissioner Friedenthal and the Superior
7 Court threatened retaliation if Plaintiff exercised her free
8 speech;
- 9 2. Violation of Plaintiff's rights under the First and
10 Fourteenth Amendments of the United States Constitution and
11 42 U.S.C. §§1983 and 1985 against Defendants Commissioner
12 Padilla and the Los Angeles County Superior Court.
13 Plaintiff alleges that "Facebook" postings violated her free
14 speech and caused emotional distress;
- 15 3. Violation of Plaintiff's rights under the First, Fifth and
16 Fourteenth Amendments of the United States Constitution and
17 42 U.S.C. §§1983, 1985 and 1988 wherein Plaintiff alleges
18 Defendants Helen Lynn, Kenneth P. Sherman and Carlson De
19 Klerk, Sherman & Rale violated Plaintiff's free speech
20 rights;
- 21 4. Violation of Plaintiff's rights under the First and
22 Fourteenth Amendments of the United States Constitution and
23 42 U.S.C. §§1983 against Defendant Michael Howard;
- 24 5. Negligent infliction of emotional distress and denial of
25 rights under the Fifth Amendment of the United States
26 Constitution against Defendant Los Angeles County Superior
27 Court for failure to supervise a Commissioner;
- 28 6. Negligent infliction of emotional distress and denial of

1 constitutional rights of the First and Fifth Amendments of
2 the United States Constitution and in violation of 42 U.S.C.
3 §1983 against Doe Defendants; and

4 7. Civil conspiracy against Defendants Helen Lynn, Kenneth P.
5 Sherman, and Carlson, De Klerk, Sherman & Rale wherein
6 Plaintiff alleges that those Defendants conspired to deprive
7 Plaintiff of child support by false pretense. (FAC at ¶¶
8 105-126.)

9

10 **DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

11 Defendants Kenneth P. Sherman, and Carlson, De Klerk, Sherman &
12 Rale contend that Plaintiff's First Amended Complaint should be
13 dismissed on the following grounds: (1) Plaintiff's civil rights
14 action is barred by the Rooker-Feldman¹ doctrine; (2) Plaintiff's
15 claims are barred by the absolute immunity provided by the Noerr-
16 Pennington Doctrine; (3) Plaintiff's claims against the attorney
17 Defendants are barred by the one-year statute of limitations on
18 actions against attorneys arising out of the performance of
19 professional services; (4) Plaintiff's civil conspiracy claim is
20 barred by the absolute litigation privilege; (5) Plaintiff lacks
21 Article III standing; and (6) Plaintiff's 42 U.S.C. § 1983 claim fails
22 because attorney Defendants were not state actors acting under color
23 of state law.

24 //

25 //

27 ¹ See District of Columbia Court of Appeals v. Feldman, 460 U.S.
28 462, 482, 103 S.Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 263
 U.S. 413, 415-16, 44 S.Ct. 149 (1923).

1 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION**

2 **FOR JUDGMENT ON THE PLEADINGS**

3 Plaintiff contends that her civil rights action is not barred by
4 the Rooker-Feldman Doctrine; Plaintiff's claims are not barred by the
5 absolute immunity provided by the Noerr-Pennington Doctrine; the one-
6 year statute of limitations on actions against attorneys arising out
7 of the performance of professional services is tolled until Plaintiff
8 knows about the actual conspiracy to commit fraud and the disclosure
9 of the illegitimate communications between Defendants that were not
10 subject to the attorney-client privilege and from the last occurrence
11 of damage pursuant to the conspiracy; California Civil Code 47
12 absolute litigation privilege does not apply to 42 U.S.C. § 1983 or §
13 1985 claims; Civil Code 47 absolute litigation privilege does not
14 apply because the tortious conduct was not relegated to the judicial
15 proceedings; Plaintiff does not lack Article III standing; and non-
16 state actors can be acting under color of law when acting in concert
17 with state actors.

18

19 **DEFENDANTS' REPLY**

20 Defendants in their Reply contend that Plaintiff's civil rights
21 claims are barred by the Rooker-Feldman Doctrine; Plaintiff's reliance
22 on McDonald² is misplaced and all of Plaintiff's claims are barred by
23 the absolute immunity provided by the Noerr-Pennington Doctrine;
24 Plaintiff admits that she suffered actual injury on December 21, 2007
25 such that her claims are absolutely barred by the one-year statute of
26 limitations embodied in California Code of Civil Procedure § 340.6;

27

28 ² McDonald v. Smith, 472 U.S. 479, 105 S.Ct. 2787 (1985).

1 the absolute litigation privilege bars Plaintiff's claims for civil
2 conspiracy; Plaintiff's opposition confirms that she lacks Article III
3 standing; and Plaintiff's response does not provide any authority
4 under which the attorney Defendants can be considered "state actors"
5 for the purpose of Plaintiff's 42 U.S.C. § 1983 claims.

6

7 **LEGAL STANDARD**

8 **A. Motion for Judgment on the Pleadings.**

9 Judgment on the pleadings pursuant to Rule 12(c) is appropriate
10 when, even if all material facts in the non-moving party's pleadings
11 are true, the moving party is entitled to judgment as a matter of law.

12 Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002),
13 overruled on other grounds by United States v. Aukai, 497 F.3d 955 (9th
14 Cir. 2007). The standard applied on a Rule 12(c) motion for judgment
15 on the pleadings is essentially the same as that applied on a Rule
16 12(b)(6) motion to dismiss for failure to state a claim upon which
17 relief can be granted. See, Hal Roach Studios, Inc. v. Richard Feiner
18 & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1989).

19 Under Federal Rule of Civil Procedure Rule 12(b)(6), a complaint
20 must be dismissed when a plaintiff's allegations fail "to state a
21 claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). To
22 survive a motion to dismiss for failure to state a claim upon which
23 relief can be granted, "[f]actual allegations must be enough to raise
24 a right to relief above the speculative level, on the assumption that
25 all the allegations in the complaint are true (even if doubtful in
26 fact)." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct.
27 1955 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to
28 dismiss does not need detailed factual allegations, a plaintiff's

1 obligation to provide the 'grounds' of his 'entitle[ment] to relief'
2 requires more than labels and conclusions, and a formulaic recitation
3 of the elements of a cause of action will not do." Id. (citations
4 omitted). In other words, "(t)hreadbare recitals of the elements of
5 a cause of action, supported by mere conclusory statements do not
6 suffice." Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937 (2009).

7 "To survive a motion to dismiss, a complaint must contain
8 sufficient factual matter, accepted as true, to 'state the claim to
9 relief that is plausible on its face.'" Iqbal, 129 S.Ct. at 1949
10 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility
11 when the plaintiff pleads factual content that allows the Court to
12 draw the reasonable inference that the defendant is liable for the
13 misconduct alleged." Iqbal, 129 S.Ct. 1937, 1949 (2009)(citing
14 Twombly, 550 U.S. at 556.) "The plausibility standard is not akin to
15 a 'probability requirement,' but it asks for more than a sheer
16 possibility that a defendant acted unlawfully." (Id.) The Complaint
17 must contain "factual content that allows the court to draw the
18 reasonable inference that the defendant is liable for the misconduct
19 alleged." Iqbal, 129 S.Ct. at 1949. "[W]here the well-pled facts do
20 not permit the court to infer more than the mere possibility of
21 misconduct, the complaint has alleged - but it has not 'show[n]' -
22 'that the pleader is entitled to relief.'" (Id. at 1950 [quoting
23 Fed.R.Civ.P. 8(a)(2) (internal brackets omitted)]. "[A] well-pled
24 complaint may proceed even if it appears that a recovery is very
25 remote and unlikely." Twombly, 550 U.S. at 556, 127 S.Ct. 1955
26 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974)).

27 Pro se pleadings are liberally construed. Ortez v. Washington
28 County, 88 F.3d 804, 807 (9th Cir. 1996). Generally, review is

1 limited to the contents of the complaint. Clegg v. Cult Awareness
2 Network, 18 F.3d 752, 754 (9th Cir. 1994). However, material which is
3 properly submitted as part of the complaint may be considered on a
4 motion to dismiss. Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir.
5 1997). Also, a court may take judicial notice of "matters of public
6 record" without converting a motion to dismiss into a motion for
7 summary judgment. Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th
8 Cir. 2001). Allegations of material fact in the complaint are taken
9 as true and construed in the light most favorable to the nonmoving
10 party. Clegg v. Cult Awareness Network, 18 F.3d at 754. "The court
11 need not, however, accept as true allegations that contradict matters
12 properly subject to judicial notice or by exhibit. Nor is the court
13 required to accept as true allegations that are merely conclusory,
14 unwarranted deductions of fact, or unreasonable inferences." Sprewell
15 v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.) (citations
16 omitted), amended by 275 F.3d 1187 (2001).

DISCUSSION

For all of the following reasons, Defendants' Motion for Judgment on the Pleadings should be granted.

A. Plaintiff's Civil Rights Action is Barred by the Rooker-Feldman Doctrine.

Plaintiff alleges in Count III that "Defendants Helen A. Lynn and Kenneth P. Sherman, Doe 6 and the partnership of Carlson, De Klerk, Sherman & Rale conspired with a state actor [i.e., Commissioner Friedenthal and the Los Angeles County Superior Court] to violate the Plaintiff's right to free speech, the posting of missing children

1 posters, by intimidating and oppressing the Plaintiff by requesting
2 the court to order monitored visitation with her child. A 42 U.S.C.
3 1983, 1985 and 1988 cause of action arises from the deprivation of the
4 Plaintiff's constitutional rights. The Defendants' action caused
5 severe emotional distress due to the loss of her constitutionally
6 guaranteed right to a parent-child relationship, as well as the
7 restriction to her First Amendment right to free speech." (FAC, ¶
8 117.)

9 Federal District Courts may exercise only original jurisdiction;
10 they may not exercise appellate jurisdiction over state court
11 decisions. District of Columbia Court of Appeals v. Feldman, 460 U.S.
12 462, 482, 103 S.Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 263
13 U.S. 413, 415-16, 44 S.Ct. 149 (1923); Dubinka v. Judges of the
14 Superior Court, 23 F.3d 218, 221 (9th Cir. 1994). This rule arises
15 from the juxtaposition of two statutes: 28 U.S.C. §1331, giving
16 District Courts original jurisdiction over civil actions arising under
17 federal law, and 28 U.S.C. §1257, giving the United States Supreme
18 Court the right to review final judgments rendered by the highest
19 court of a state. Dubinka at 221. The rule applies even when the
20 challenge to the state court's decision is based on alleged
21 deprivations of federally protected rights. Allah v. Superior Court,
22 871 F.2d 887, 891 (9th Cir. 1989).

23 A federal Plaintiff may not avoid the Rooker-Feldman bar by
24 styling an attack on a state court's ruling as a civil rights action.
25 Branson v. Nott, 62 F.3d 287, 291 (9th Cir. 1995), cert. denied, 116
26 S. Ct. 565 (1995); Worldwide Church of God v. McNair, 805 F.2d 888,
27 893 n. 4. In determining whether a civil rights action is such an
28 attack, the Court must determine whether the federal Plaintiff's

1 claims are "inextricably intertwined" with the state court's ruling.
2 District of Columbia Court of Appeals v. Feldman 460 U.S. 462, 482 n.
3 16, 103 S.Ct. (1983); Dubinka v. Judges of the Superior Court, 23 F.3d
4 218, 221 (9th Cir. 1994). A federal claim is inextricably intertwined
5 with the state court's ruling when a district court must scrutinize
6 the state court's application of the law. Dubinka at 222. Put
7 another way, a "federal claim is inextricably intertwined with the
8 state court judgment if the federal claim succeeds only to the extent
9 that the state court wrongly decided the issues before it." Pennzoil
10 Co. v. Texaco, Inc., 481 U.S. 1, 25, 107 S.Ct. 1519 (1987) (Marshall,
11 J., concurring.)

12 Plaintiff alleges that the attorney Defendants and Helen Lynn
13 conspired with Defendant Commissioner Friedenthal and violated
14 Plaintiff's right to free speech. (FAC, ¶ 117.) It appears that
15 Plaintiff, unhappy with the Los Angeles County Superior Court's
16 rulings, is attempting to circumvent the decisions of the Los Angeles
17 County Superior Court by filing a civil rights action. This is
18 improper; rather, Plaintiff should appeal the Los Angeles County
19 Superior Court's rulings through the state court system.

20 Plaintiff further alleges that Defendants' actions in ordering
21 Plaintiff's visitations with her son be monitored violated her
22 constitutional rights and restricted her First Amendment right to free
23 speech. (FAC, ¶ 117.) However, "[t]o establish a First Amendment
24 retaliation claim ... a plaintiff must show that: (i) [she] was
25 engaged in a constitutionally protected activity, (ii) that the
26 defendants' actions would chill a person of ordinary firmness from
27 continuing to engage in the protected activity, and (iii) that the
28 protected activity was a substantial or motivating factor in the

defendant's conduct." Pinard v. Clatskanie School Dist. 6J, 467 F.3d 755, 770 (9th Cir. 2006); Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999).

In order to analyze Plaintiff's civil rights violations based on the allegations contained in ¶ 117 of the FAC, this Court necessarily would have to determine whether the Los Angeles County Superior Court's decision was correct. Specifically, this Court would need to render a decision on whether Defendant Commissioner Friedenthal's alleged orders prohibiting Plaintiff from posting missing children posters in her former in-laws' neighborhood and requiring Plaintiff's visits with her son, B.L., to be professionally monitored, were correct. Consequently, any claims arising out of these allegations are inextricably intertwined with the Los Angeles County Superior Court's rulings, and are barred by the Rooker-Feldman Doctrine as a matter of law.

B. Plaintiff's Claims Are Barred by the Absolute Immunity Provided by the Noerr-Pennington Doctrine.

The Noerr-Pennington Doctrine, which arose in the context of antitrust law, holds that those who petition the government for redress are generally immune from liability. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 92 S.Ct. 609 (1972)[the Noerr-Pennington Doctrine extended to "the approach of citizens ... to administrative agencies ... and to the courts"]. The Doctrine is well established under California law and has been applied to bar liability for activities undertaken in the course of representing a client in litigation. Premier Medical Management Systems, Inc. v. California Ins. Guarantee Ass'n., 136 Cal.App.4th

1 464, 478-79 (2006). The immunity applies no matter how a plaintiff
2 chooses to characterize a purported cause of action if, as here, the
3 acts which necessarily underlie the purported cause of action are
4 taken in the course of presenting a matter in a court of law. In
5 Ludwig v. Superior Court, 37 Cal.App.4th 8, 21-22, fn. 17 (1995), the
6 Court explained, "obviously, the principle of constitutional law that
7 bars litigation arising from injuries received as a consequence of
8 First Amendment petitioning activity [should be applied] regardless of
9 the underlying cause of action asserted by the plaintiffs [citation].
10 [T]o hold otherwise would effectively chill the defendants' First
11 Amendment rights [citation]." Ludwig, 37 Cal.App.4th at 21-22, fn. 17
12 (quoting Hi-Top Steel Corp. v. Lehrer, 24 Cal.App.4th 510, 577-78
13 (1994)).

14 In Premier Medical Management Systems, Inc. v. California Ins.
15 Guarantee Ass'n., supra, the Court analyzed the applicability of the
16 Noerr-Pennington Doctrine to bar liability based upon conduct
undertaken in the course of litigating lien claims. In holding that
17 the complaint was subject to being stricken insofar as the Noerr-
18 Pennington Doctrine completely barred plaintiff's claims, the court
concluded, "[t]he gravamen of plaintiff's action arises from the
21 activity of defendants in litigating lien claims ..." Premier, 136 Cal.
22 App. 4th at 477. Holding that the right of litigants and their
23 counsel to present their positions in a court of law constitutes the
24 essence of petitioning activity, the court dismissed the claim in its
25 entirety.

26 Plaintiff in her Opposition relies on McDonald v. Smith, 472 U.S.
27 479, 105 S.Ct. 2787 (1985) for the proposition that the Noerr-
28 Pennington Doctrine does not apply to her case. Plaintiff argues that

1 libelous and damaging falsehoods in petitions to Government officials
2 are not protected by the Noerr-Pennington Doctrine. Plaintiff's
3 reliance on McDonald, however, is mistaken. The attorney Defendants
4 are being sued by Plaintiff for their conduct associated with
5 litigation on behalf of Plaintiff's minor sons, B.L. and S.L.
6 Plaintiff's claims against Defendants Kenneth P. Sherman, and the law
7 firm Carlson, De Clerk, Sherman & Rale are based on their petitioning
8 activities in the custody dispute. The gravamen of Plaintiff's
9 Complaint is that after the attorney Defendants were appointed by the
10 Court to represent Plaintiff's sons, they conspired with the Court and
11 others to deprive her of her constitutional right to free speech and
12 a parent-child relationship. However, the attorney Defendants'
13 conduct cannot be characterized as libel, such that McDonald would
14 apply.

15 Plaintiff also contends that the attorney Defendants have been
16 sued as a result of their activities on behalf of Defendant Helen Lynn
17 and her daughter Crystal Lynn Strelloff (Opposition at 15) and
18 therefore are not protected by the Noerr-Pennington Doctrine.
19 However, the attorney Defendants did not represent either Helen Lynn
20 or Crystal Lynn Strelloff.

21 The attorney Defendants have the right to present their positions
22 and their clients' positions in a court of law. The attorney
23 Defendants are protected by the Noerr-Pennington Doctrine because
24 their representation of Plaintiff's minor sons, B.L. and S.L., in the
25 underlying action was petitioning activity. The attorney Defendants
26 were appointed by Defendant Commissioner Friedenthal to advocate for
27 their clients, S.L. and B.L. Plaintiff's claims are therefore barred
28 under the Noerr-Pennington Doctrine as a matter of law.

1 C. Plaintiff's Claims Against the Attorney Defendants Are
2 Barred by the One-Year Statute of Limitations on Actions
3 Against Attorneys Arising out of the Performance of Their
4 Professional Services.

5 California Code of Civil Procedure § 340.6 governs the statute of
6 limitations for all actions (other than actual fraud) regarding an
7 attorney's alleged wrongful act or omission, regardless of the theory
8 pled. Section 340.6 provides that:

9 "(a) An action against an attorney for a wrongful act
10 or omission, other than for actual fraud, arising in the
11 performance of professional services shall be commenced
12 within one year after the plaintiff discovers, or through
13 the use of reasonable diligence should have discovered, the
14 facts constituting the wrongful act or omission, or four
15 years from the date of the wrongful act or omission,
16 whichever occurs first. ... in no event shall the time for
17 commencement of legal action exceed four years except that
18 the period shall be tolled during the time that ...:
19 (1) The plaintiff has not sustained actual injury."

20
21 In July of 2007, Defendant Kenneth P. Sherman was appointed by
22 Defendant Commissioner Friedenthal to represent Plaintiff's two minor
23 sons, B.L. and S.L., in the custody proceedings. (FAC, ¶¶ 11, 12, 38.)
24 As noted by Plaintiff in her Opposition, Defendant Kenneth P. Sherman
25 was relieved as attorney of record on July 16, 2008. (Opposition at
26 1.)

27 Plaintiff was aware of the facts giving rise to her claim against
28 the attorney Defendants by December 21, 2007. At that time, Defendant

1 Kenneth P. Sherman is alleged to have: "[f]iled an Application for
2 Order and Supporting Declaration dated December 19, 2007 in order to
3 effect the ex parte order to require a monitor for Laura's visits.
4 Mr. Sherman did not speak to Laura about the 'facts' he alleged. Mr.
5 Sherman made his recommendations based on double hearsay (what Helen
6 said B.L. said Laura said) and the act of hanging the missing children
7 posters." (FAC, ¶ 52.) On that date, Defendant Commissioner
8 Friedenthal issued a temporary order requiring Plaintiff's visits with
9 her son, B.L., to be monitored. (RJN, Ex. 2 at p. 2: 15-26.)

10 Plaintiff alleges that "Defendants Helen A. Lynn and Kenneth P.
11 Sherman, Doe 6 and the partnership of Carlson, De Klerk, Sherman &
12 Rale conspired with a state actor to violate Plaintiff's right to free
13 speech, the posting of missing children posters, by intimidating and
14 oppressing the Plaintiff by requesting the Court to order monitored
15 visitation with her child." (FAC, ¶ 117.) Plaintiff further alleges
16 that "[t]he Defendants' actions caused severe emotional distress due
17 to the loss of her constitutionally guaranteed right to a parent-child
18 relationship, as well as the restriction to her First Amendment right
19 to free speech." (Id.)

20 Based on Plaintiff's allegations, her rights were infringed upon
21 by the Los Angeles County Superior Court's December 21, 2007 order
22 requiring her visits to be professionally monitored. (FAC, ¶ 51; RJN,
23 Ex. 2.) There is no question but that the December 21, 2007 Order
24 caused Plaintiff to suffer "actual injury" sufficient to end any
25 tolling of the one-year statute of limitations. Plaintiff was
26 therefore required to file her action against the attorney Defendants
27 within one year thereafter, or by no later than December 21, 2008.
28 Plaintiff's Complaint filed on or about November 25, 2009 was filed

1 more than 11 months after the statute of limitations expired.
2

3 **D. Plaintiff Lacks Article III Standing.**

4 Defendants Kenneth P. Sherman and Carlson, De Clerk, Sherman &
5 Rale contend that Plaintiff lacks standing under Article III to bring
6 this action. As stated in O'Shea v. Littleton, 414 U.S. 488, 493-94,
7 94 S.Ct. 669 (1974), "Plaintiffs in the federal courts 'must allege
8 some threatened or actual injury resulting from the putatively illegal
9 action before a federal court may assume jurisdiction.' ... Abstract
10 injury is not enough. It must be alleged that the Plaintiff 'has
11 sustained or is immediately in danger of sustaining some direct
12 injury' as the result of the challenged statute or official conduct.
13 ... The injury or threat of injury must be both 'real and immediate,'
14 not 'conjectural' or 'hypothetical.'" (Citations omitted.)

15 Here, there is no "current controversy" between Plaintiff, and
16 the attorney Defendants. As conceded in Plaintiff's FAC, the attorney
17 Defendants were relieved as counsel for Plaintiff's sons, B.L. and
18 S.L., in July of 2008, more than a year before Plaintiff filed her
19 original Complaint. (FAC, ¶ 62; Opposition at 1.) Moreover, the only
20 alleged misconduct of the attorney Defendants amounted to their ex
21 parte application seeking professional monitoring of Plaintiff's
22 visitations with her son, B.L., in December of 2007. Since the
23 attorney Defendants' withdrawal from the underlying custody dispute,
24 there has been no act or omission of the attorney Defendants alleged
25 by Plaintiff to cause Plaintiff injury. Plaintiff does not have any
26 present injury in fact and therefore, does not have Article III
27 standing to proceed with this action against the attorney Defendants.
28 //

1 **E. Plaintiff Has Failed To State A Claim Against Each Defendant**
2 Under Section 1983.

3 42 U.S.C. §1983 provides:

4 "Every person who, under color of any statute,
5 ordinance, regulation, custom, or usage, of any state...
6 subjects, or causes to be subjected, any citizen of the
7 United States or other person within the jurisdiction
8 thereof to the deprivation of any rights, privileges, or
9 immunities secured by the Constitution and laws, shall be
10 liable to the party injured in an action at law, suit in
11 equity, or other proper proceeding for redress."

12

13 In order to state a claim under §1983, Plaintiff must allege
14 that: (1) Defendant was acting under color of state law at the time
15 the complained-of act was committed; and (2) Defendant's conduct
16 deprived Plaintiff of rights, privileges or immunities secured by the
17 Constitution or laws of the United States. Parratt v. Taylor, 451
18 U.S. 527, 535, 101 S.Ct. 1908, (1981), overruled on other grounds by
19 Daniels v. Williams, 474 U.S. 327, 330-31, 106 S.Ct. 677 (1986);
20 Jensen v. City of Oxnard, 145 F.3d 1078, 1082 (9th Cir.), cert. denied,
21 119 S.Ct. 540 (1998).

22 Plaintiff also must establish causation, by demonstrating that
23 each Defendant personally was involved in the constitutional
24 violation, or that there was a sufficient causal connection between
25 the Defendant's wrongful conduct and the constitutional violation.
26 Redman v. County of San Diego, 942 F.2d 1435, 1446-47 (9th Cir.
27 1991)(en banc), cert. denied, 502 U.S. 1074 (1992); Hansen v. Black,
28 885 F.2d 642, 646 (9th Cir. 1989). "The inquiry into causation must

1 be individualized to focus on the duties and responsibilities of each
2 individual defendant whose acts or omissions are alleged to have
3 caused a constitutional deprivation." Leer v. Murphy 844 F.2d 628,
4 633 (9th Cir. 1988).

5 Liability may be imposed on an individual defendant under §1983
6 only if the plaintiff can show that the defendant proximately caused
7 the deprivations of his federally protected rights of which he
8 complains. Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris
9 v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981).

10 To state a claim under Title 42 U.S.C. §1983, the plaintiff must
11 allege a violation of her constitutional rights and show that the
12 defendant's actions were taken under color of state law. West v.
13 Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250 (1988); Gritchen v. Collier,
14 254 F.3d 807, 812 (9th Cir.2001). That the defendant act under color
15 of state law is "'a jurisdictional requisite for a §1983 action.'" Id.
16 (quoting West v. Atkins, 487 U.S. 42, 46, 108 S.Ct. 2250 (1988)).
17 Similarly, a plaintiff basing a cause of action on alleged
18 constitutional violations must show that the "actions complained of
19 are 'fairly attributable' to the government." Morse v. North Coast
20 Opportunities, Inc., 118 F.3d 1338, 1340 (9th Cir. 1997).

21 Generally, private actors are not acting under color of state
22 law. See Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991). In
23 order to determine whether a private actor acts under color of law for
24 §1983 purposes, the Court looks to whether the conduct causing the
25 alleged deprivation of federal rights is fairly attributable to the
26 State. Id. (citing Lugar v. Edmundson Oil Co., Inc., 457 U.S. 922,
27 937, 102 S.Ct. 2744 (1982)). Conduct may be fairly attributable to
28 the State where (1) it results from a governmental policy and (2) the

1 defendant is someone who fairly may be said to be a governmental
2 actor. Lugar v. Edmundson Oil Co., Inc., 457 U.S. 922, 937, 102 S.Ct.
3 2744 (1982); see also Sutton v. Providence St. Joseph Medical Center,
4 192 F.3d 826, 839 (9th Cir. 1999). Defendants Kenneth P. Sherman and
5 Carlson, De Klerk, Sherman & Rale are not state actors.

6 Here, Plaintiff has failed to set forth sufficient facts against
7 Defendants Kenneth P. Sherman and the law firm of Carlson, De Klerk,
8 Sherman and Rale to state a civil rights cause of action under 42
9 U.S.C. §1983. Defendants Kenneth P. Sherman and Carlson, De Klerk,
10 Sherman and Rale are not "state actors." Plaintiff's FAC against the
11 attorney Defendants must be dismissed because Defendant Kenneth P.
12 Sherman was not "acting under color of state law." Here, the attorney
13 Defendants were appointed by Defendant Commissioner Friedenthal to
14 represent Plaintiff's minor children in a custody dispute. (FAC, ¶¶
15 11, 38.) The attorney Defendants did not represent Plaintiff, nor did
16 they owe any duty to her. The attorney Defendants only owed a duty to
17 the children to act in their best interests with respect to the
18 custody proceedings. Consequently, the attorney Defendants could not
19 and did not act under color of state law at any time during the
20 custody proceedings when they communicated with Helen Lynn, Plaintiff,
21 or the Court; when they filed the ex parte application seeking
22 monitored visitations with B.L.; or when they allegedly chose to
23 ignore Plaintiff's phone calls and work with Helen in drafting a
24 declaration for the ex parte application. As a private attorney
25 appointed by the court, Defendant Kenneth P. Sherman was still acting
26 as a private actor. Additionally, any services performed by the
27 attorney Defendants in connection with the underlying custody dispute
28 could not constitute actions under color of state law. See Franklin

1 v. Oregon, 662 F.2d 1337, 1345 (9th Cir. 1981).

2

3 **F. Plaintiff's Civil Conspiracy Claim Is Barred by the**
4 **Litigation Privilege Set Forth in Civil Code § 47(b)**.

5 Plaintiff in the seventh count of the FAC alleges, in a single
6 sentence, that "Helen Lynn, Kenneth P. Sherman, Carlson, De Klerk,
7 Sherman & Rale and Doe 6 conspired to defraud the Plaintiff of child
8 support by false pretense ." (FAC, ¶ 126.) "The litigation privilege
9 shields any 'publication or broadcast' made in any ... judicial
10 proceeding." A. F. Brown Elec. Contractor, Inc. v. Rhino Electric
11 Supply, Inc., 137 Cal.App.4th 1118, 1126, 41 Cal.Rptr.3d (2006); see
12 also California Civil Code § 47(b). All of Plaintiff's claims against
13 the attorney Defendants are absolutely privileged as communications in
14 legal proceedings which have some connection or logical relation to
15 the legal proceedings. In Rusheen v. Cohen, 37 Cal.4th 1048, 39 Cal.
16 Rptr. 3d 516 (2006), the California Supreme Court explained that the
17 absolute immunity under Civil Code § 47(b) litigation privilege
18 extended to communications "with some relation" to judicial
19 proceedings and extends to the steps taken thereafter in execution on
20 the judgment.

21 Thus, "communications with 'some relation' to judicial
22 proceedings" are "absolutely immune from tort liability" by the
23 litigation privilege. Rubin v. Green, 4 Cal.4th 1187, 1193, 17 Cal.
24 Rptr. 2d 828 (1993). It is not limited to statements made during a
25 trial or other proceedings, but may extend to steps taken prior
26 thereto, or afterwards." (Id. at 1057.) The litigation privilege is
27 absolute and bars all causes of action other than a claim for
28 malicious prosecution, including those asserted in federal court.

1 Rohde v. Wolf, 154 Cal.App.4th 28, 38, 64 Cal.Rptr.3d 348 (2007). It
2 has also been regularly applied in federal courts. "The usual
3 formulation is that the privilege applies to any communication (1)
4 made in judicial or quasi-judicial proceedings; (2) by litigants or
5 other participants authorized by law; (3) to achieve the objects of
6 the litigation; and (4) that have some connection or logical relation
7 to the action [Citations]." Silberg v. Anderson, 50 Cal.3d 205, 212
8 (1990). See Morales v. Cooperative of Am. Physicians, Inc., 180 F.3d
9 1060, 1062 (9th Cir. 1999). Courts have given the privilege an
10 expansive reach and held that the privilege is absolute, even in cases
11 in which the result is inequitable. Doctors' Co. Ins. Servs. v.
12 Superior Court, 225 Cal.App.3d 1284, 1294, 275 Cal. Rptr. 674 (1990).
13 Any doubt as to whether the privilege applies is resolved in favor of
14 applying it. Adams v. Superior Court, 2 Cal.App.4th 521, 529, 3 Cal.
15 Rptr. 2d 49 (1992).

16 "Pleadings and process in a case are generally viewed as
17 privileged communications." Navellier v. Sletten, 106 Cal.App.4th
18 763, 770, 131 Cal. Rptr. 2d 201 (2003). Indeed, even allegedly false
19 or perjurious pleadings and declarations have been held to be covered
20 by the litigation privilege. See Pollock v. University of Southern
21 California, 112 Cal.App.4th 1416, 1431, 6 Cal. Rptr. 3d 122 (2003)(A
22 declaration "functions as written testimony," is a "communication, not
23 conduct" and "is exactly the sort of communication that privilege is
24 designed to protect").

25 Thus, Plaintiff's conspiracy claim only alleges conduct by the
26 attorney Defendants arising out of the representation of Plaintiff's
27 minor sons B.L. and S.L. in the family court action, namely, their
28 alleged interference with Plaintiff's claim for child custody. As

1 such, the attorney Defendants' conduct is absolutely privileged.
2 Indeed, the conduct alleged by Plaintiff relates solely to
3 communications and recommendations to a court relating to issues under
4 consideration by that court. As such, Plaintiff's claims against the
5 attorney Defendants are barred.

6 Further, a conspiracy claim brought under § 1983 requires proof
7 of an "agreement or meeting the minds to violate constitutional
8 rights." Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002), quoting
9 United Steel Workers of America v. Phelps Dodge, 865 F.2d 1539, 1540,
10 41 (9th Cir. 1989)(citation omitted), and an actual deprivation of
11 constitutional rights. Hurt v. Parks, 450 F.3d 1059, 1071 (9th Cir.
12 2006)(quoting Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121,
13 1126 (9th Cir. 1989). "To be liable, each participant in the
14 conspiracy need not know the exact details of the plan, but each
15 participant must at least share the common objective of the
16 conspiracy." Franklin, 312 F.3d at 441, quoting United Steel Workers,
17 865 F.2d at 1541.

18 To state a claim for conspiracy, Plaintiff must allege specific
19 facts showing two or more persons intended to accomplish an unlawful
20 objective of causing Plaintiff harm and took some concerted action in
21 furtherance thereof. Gilbrook v. City of Westminster, 177 F.3d 839
22 (9th Cir. 1999); Burns v. County of King, 883 F.2d 819, 822 (9th Cir.
23 1989)(conclusory allegations of conspiracy insufficient to state a
24 valid § 1983 claim); see also Margolis v. Ryan, 140 F.3d 850, 852 (9th
25 Cir. 1998)(to state a claim for conspiracy under § 1983, Plaintiff
26 must allege facts showing agreement of the alleged conspirators to
27 deprive him of his rights. A conspiracy allegation, even if
28 established, does not give rise to a liability under § 1983 unless

1 there is a deprivation of civil rights.).

2 A valid claim for conspiracy between private parties and the
3 government to violate constitutional rights requires an agreement or
4 "meeting of the minds." Adickes v. S.H. Kress and Co., 398 U.S. 144,
5 158 (1970). Further, the acts of the private parties must be
6 "sufficiently intertwined" with a violating government actor amounting
7 to more than "near acquiescence." Fonda v. Gray, 707 F.2d 435, 438
8 (9th Cir. 1983). Accordingly, Plaintiff has failed to state a civil
9 conspiracy claim and the attorney Defendants must be dismissed.

10

11 **RECOMMENDATION**

12 For all of the foregoing reasons, **IT IS RECOMMENDED** that the
13 District Court issue an Order: (1) approving and adopting this Report
14 and Recommendation; (2) granting Defendants Kenneth P. Sherman and
15 Carlson, De Klerk, Sherman & Rale's Motion for Judgment on the
16 Pleadings; and (3) directing that an Order be entered dismissing these
17 Defendants from this action with prejudice.

18

19 DATED: December 2, 2011

/s/

VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

20

21

22 **NOTICE**

23 Reports and Recommendations are not appealable to the Court of
24 Appeals, but are subject to the right of any party to timely file
25 Objections as provided in the Local Rules Governing the Duties of the
26 Magistrate Judges, and review by the District Judge whose initials
27 appear in the docket number. No Notice of Appeal pursuant to the
28 Federal Rules of Appellate Procedure should be filed until entry of

1 the Judgment of the District Court.
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